Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JOHN P. McKENZIE,

Petitioner,

vs.

GENERAL TELEPHONE CO. OF CALIFORNIA, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether or not an ERISA disability plan administrator is required to obtain vocational evidence before making a final determination of eligibility under a general ("any occupation") disability clause where it is uncontroverted that the participant is disabled from his regular occupation.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner

John P. McKenzie

Respondents

General Telephone Company of California, dba GTEL[1]
GTE Long Term Disability Plan
GTE Medical Benefits Plan
GTE Pension Plan,
GTE Life Insurance Plan
The Travelers Insurance Company
(The Travelers Indemnity Company of Rhode Island)

List of Parent Corporations (Rule 29.1)

GTE Corporation

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1. GTEL is the local affiliate of GTE Corporation and was McKenzie's employer. McKenzie sued GTEL for employer provided absent sick benefits. That claim was settled prior to the district court's Order Granting Defendant's Motion For Summary Judgment.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

John P. McKenzie,

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General Telephone Company of California da GTEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John P. McKenzie, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on December 5, 1994.

OPINIONS BELOW

The December 5, 1994, opinion of the Ninth Circuit Court of Appeals, whose judgment is herein sought to be reviewed is reported at Slip Opinion 14971, Dk9 93-15532, and is reprinted in the separate Appendix to this Petition. (Appendix C, pp. 4a.-19a).

The prior opinion of the United States District Court for the Northern District of California, dated March 3, 1993, entitled Order Granting Defendant's Motion For Summary Judgment, and is reprinted in the separate Appendix to this Petition. (Appendix E, pp. 21a-26a).

The prior opinion of the United States District Court for the Northern District of California, dated November 10, 1992, entitled Order Remanding This Matter For Further Evidentiary Submission, and is reprinted in the separate Appendix to this Petition. (Appendix F, pp. 27a-37a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves an action for long term disability benefits commenced under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Secs. 1001-1461, and brought specifically under ERISA, Sec 502(a)(1)(B), 29 U.S.C. Sec. 1132(a)(1)(B).

STATEMENT OF THE CASE

1. Introduction

Petitioner John P. McKenzie (McKenzie) commenced this action to seek District Court review of The Travelers Insurance Company's (Travelers) decision to withdraw long term disability benefits at the time of an 18 month review. Eligibility for benefits required that he be "totally disabled" as defined under The GTE Long Term Disability Income Protection Plan (LTD Plan). For the initial 18 months, total disability was defined as an inability to perform the participant's "regular occupation." After 18 months the LTD Plan required that the participant be disabled from performing "any occupation" the participant was otherwise qualified to perform by reason of his education, training and experience. (Appendix C pp. 6a-7a, footnote 2). Travelers admitted, at all times material hereto, that McKenzie was and is totally disabled from his "regular" occupation.

In the district court, McKenzie

argued, in part, that the "any occupation" standard requires consideration of vocational evidence and therefore the court should overturn the administrator's decision as "arbitrary and capricious" for the record at the time of withdrawal decision showed that the Travelers had failed to consider sufficient vocational evidence.[2]

2. Summary of Facts

i. The LTD Benefit Plan

The LTD Plan is an ERISA qualified employee welfare plan and is offered to certain management employees of GTE affiliated companies. The plan is contributory and underwritten by a group policy which was issued by The Travelers Indemnity Company of Rhode Island. The LTD Plan expressly delegates eligibility decisions to Travelers. Benefits are payable at the end of the qualifying disability period, typically the point in time when the disabled employee's absent sick benefits are exhausted. The only act required under the LTD Plan of a participant is submission of the required proof of loss. A participant is eligible for plan benefits if they are "Totally Disabled." The plan provides for a two

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2. Travelers admitted that it made no vocational analysis as part of the 18 month review and that it did not specify any jobs suitable for McKenzie, other than to state "sedentary" work.

tier definition of "Totally Disabled" as follows:

TOTAL DISABILITY

1. During the first 18 months only of absence from work because of disability you will be assumed to be totally disabled if because of disability you are unable (as determined by The Travelers) to perform the normal duties of your regular occupation for any employer or an alternate occupation with similar earnings potential and you are not engaged in any other occupation or employment for wage or profit; and,

2. After the first 18 months you will be considered totally disabled only if you are completely unable to engage in any and every duty pertaining to any occupation or employment for wage or profit for which you are or become reasonably qualified by training, education or experience.

A participant qualified for LTD Plan benefits is automatically entitled to benefits afforded under the companion GTE life insurance, medical and pension plans. The LTD Plan does require that a participant, found eligible for benefits, to then seek disability income from Social Security. If Social Security Disability Income is awarded, that amount is deducted from LTD payments. A disability arising from a prior condition

is covered under the plan.

ii. **McKenzie's Disability**

McKenzie is currently 52 years old (born 2/25/42). He is married and has two children. Until his disability in May, 1989, he had worked all of his adult life.

In late August, 1987, McKenzie interviewed for the position of general manager of operations for Northern California with GTEL. As part of the selection process, McKenzie submitted to a complete company physical, wherein he disclosed the fact that he had experienced periodic back problems, including a history of back surgery. (McKenzie has a distinctive surgical scar on his lower back) McKenzie was hired on September 28, 1987, as GTEL's San Francisco Bay Area, Operations and Results Manger. As a management level employee, McKenzie qualified to participate in the LTD Plan and he elected to join. The monthly LTD Plan premium was paid by a direct payroll deduction.

GTEL services telephone equipment and switches manufactured and sold by GTE and other suppliers. McKenzie was not involved in the installation or repair work. Typically he worked at his desk and concerned himself with paper work, telephone calls, and matters typical of a management desk job. On occasions, he would go to various sites to confer with customers. By any standard, the physical

demands of the position could be described as "sedentary." [3]

McKenzie worked continuously from September, 1987, to January, 1989, except for a six day absence due to the flu. Throughout that time, he experienced periodic back trouble but the pain was not so severe as to interfere with his work activities. During the first week of January, 1989, McKenzie suffered from acute back pain. He consulted Dr. Keane, of the Spine Care Medical Group, located in the San Francisco Bay Area. On January 13, 1989, after comprehensive testing, Dr. Keane placed McKenzie on temporary disability and ordered an aggressive back rehabilitation program. McKenzie returned to work on April 17, 1989. On May 22, 1989, he again experienced acute symptoms. He was seen later that morning, by Dr. Keane, and was again ordered to go on temporary disability. July 10, 1989, was a target return date, however McKenzie's condition failed to improve, in fact it worsened.

iii. <u>Initial Approval LTD Plan Benefits</u>

In June, McKenzie contacted GTEL's Human Resources Department to submit a claim for long term disability benefits. GTEL refused to process the claim

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3. The Dictionary of Occupational Titles defines "sedentary," in part has a job wherein lifting 10 lbs or more is not required.

request, and asserted that McKenzie's employment status had been terminated while on leave. GTEL later reversed itself and in late June, 1989, provided McKenzie with the claims form specified by the LTD Plan. In July, 1989, it transmitted the completed claim to Travelers for processing. At or near the same time, McKenzie applied for Social Security disability benefits and California State disability benefits.

In early October, 1989, McKenzie received a letter from Travelers, dated October 2, 1989, advising that his claim for LTD Plan benefits had been approved, retroactive to the expiration date of McKenzie's absent sick benefits. Later, in October, 1989, McKenzie was awarded state disability benefits and in March, 1990, Social Security acted to retroactively award Social Security Disability benefits to his date of application, namely July, 1989.

iv. **Traveler's 18 month Review & Withdrawal of LTD Plan Benefits**

In August, 1990, Traveler's undertook a review of McKenzie's disability status. The review was predicated upon the stricter "any occupation" language of the LTD Plan. To conduct its review, Travelers obtained a progress report from Dr. Keane, dated September 11, 1990, in which Dr. Keane opined that McKenzie's "functional level, ..remains quite low"..and that "he (McKenzie) is quite disabled." Later, on September 19, 1990, Dr. Keane

furnished information reporting various objective findings in support of his opinion. Included in the record were objective findings showing, in part, lateral recess stenosis, foramina stenosis at L4-L5 and central disc herniation at C4-C5.

Thereafter, Travelers requested that McKenzie see a board certified orthopedist. After various exchanges, McKenzie was examined by Dr. E.A. Baciocco. Dr. Baciocco issued a letter report to Travelers. The letter did not unequivocally state that McKenzie could or could not work. Rather, the only opinion expressed by the doctor was a cryptic commented that he was "somewhat nervous" by the fact that McKenzie had not returned to work. Dr. Baciocco did, however close his report with a recommendation that McKenzie undergo a series of treatment calling for "epidural type steroid injections" and "anti-inflamatories."

Absent from the 18 month review was <u>any</u> inquiry by Travelers regarding McKenzie education, training and prior work experience. Accordingly, the only information in the administrator's record at the time of the withdrawal decision, appeared on McKenzie's initial Statement of Claim. That document disclosed:

> a. McKenzie's education (by circling highest grade completed) was disclosed "more than 16 years;" and,

b. McKenzie's job title with GTEL was "Regional Service Mgr."

McKenzie also hand wrote, in pertinent part, that his job requirements (at GTEL) "include the ability to travel, walk construction sites and sit at my desk or in meetings for hours at a time...involved planning and problem solving..[and] my back is pain is greatly intensified by standing or sitting for more than a few minutes." (Appendix F p.36a).

Shortly after receipt of the Baciocco's letter, Travelers deemed its 18 month review to be completed and notified McKenzie, by correspondence, that his LTD Plan benefits would be withdrawn, effective November 23, 1990. The termination letter recited the "any occupation" language. The stated reason for the withdrawal decision was "we (Travelers) have not received supporting objective medical documentation with respect to your continuing disability." The letter further noted that Travelers' deemed that "Dr. Baciocco's October 18, 1990 letter does not support your continuing disability from any occupation.

On January 5, 1991, McKenzie requested that Traveler's reconsider its decision to withdraw benefits. By correspondence dated January 24, 1991, Travelers affirmed the November decision and advised, in part, "when assessing your claim, consideration is given to the objective medical findings...'total

disability' must be supported by detailed examination findings, x-ray and other test results."

Later, in April, 1991, McKenzie furnished Travelers with a letter from Dr. Kneapler, his treating rheumatologist. Dr. Kneapler opined that "(he) did not think the arthralgia were incapacitating but a source of significant discomfort. His spinal discomfort is more severe and does prevent his returning to any gainful employ."

After receipt of the Kneapler letter, Travelers again affirmed its November termination decision in June, 1990. Travelers stated that "the physical demands of McKenzie's former work at GTEL justified its initial award of LTD Plan benefits." (Travelers did not specify the job activity beyond McKenzie's abilities) However Travelers then erroneously stated that "Dr. Baciocco felt that Mr. McKenzie could perform sedentary work." Travelers summarily dismissed Dr. Kneapler opinion, and concluded that its withdrawal decision would stand.

McKenzie viewed Travelers' decisions as inconsistent. On the one hand, Travelers admitted that he could not undertake his normal occupation and on the other hand it believed that he could perform "sedentary" work. Since McKenzie believed that no comparable position that was more sedentary than his GTEL position which he was forced to give up, he

commenced the suit. [4]

3. The Rulings Below

McKenzie and Travelers filed cross-motions for summary judgment.[5] McKenzie's motion was predicated, in part, upon his contention that the "any occupation" standard required consideration of vocational evidence,[6] and therefore the Travelers record was inadequate.

In support of that argument, McKenzie argued the principles set forth in *Jenkinson v. Chevron Corp.*, 634 F.

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4. Months after the withdrawal decision, in proceedings before the District Court, additional facts were submitted by the litigants. Those facts included a transcript from a Travelers' deposition wherein it stated that Travelers' believed McKenzie to be quite disabled. That it agreed that McKenzie could not sit or stand for more than 30 minutes, or walk more than a block or two.

5. McKenzie sought summary adjudication of issues, for the dollar amount due under LTD Plan was subject to a factual dispute.

6. McKenzie challenged any use of the stricter "any occupation" standard due to GTEL and Travelers' failure to provide a Summary Plan Description, mandated by ERISA, 29 U.S.C. Sec. 1021 & 1024(b), prior to his becoming disabled. Supp. 375

(N.D. Cal., 1986) and in *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496 (8th Cir., 1989).

In its analysis, the District Court first distinguished McKenzie's case from *Madden vs. ITT Long Term Disability Plan*, 914 F.2d 1279, 1285 (9th Cir. 1990). The court correctly found that, unlike *Madden* the Travelers' record here contained medical evidence of physical impairment.[7] (Appendix F p. 34a). The court then expressly stated that it found the reasoning in *Jenkinson* "persuasive" and searched the record for evidence that would meet the "vocational prong." (Appendix F pp. 34a-35a). That search yielded only McKenzie's initial claims application. (Appendix F, p. 36a)

The District Court held that "[T]ravelers never performed any analysis specifying what jobs McKenzie could perform, aside from generally concluding he could perform 'sedentary work.' In

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7. In *Madden v. ITT Long Term Disability Plan*, 194 F.2d 1279, 1285 (9th Cir. 1990) the administrator did assemble vocational evidence when the beneficiary requested a review of the withdrawal decision. The opinion suggests however that it need not consider that evidence for the medical record taken alone established that Madden was not disabled. Here the medical evidence showed physical impairment and it is admitted McKenzie is unable to perform his regular job.

addition Travelers does not dispute McKenzie's contention that it failed to perform any independent vocational analysis prior to withdrawing McKenzie's benefits. Travelers admits that it did not (1) perform a Dictionary of Occupational Titles analysis to ascertain whether or not McKenzie's skills were transferable to another occupation (2) make a labor market survey, nor (3) make an analysis of management positions in telecommunications that did not involve travel." (Appendix F, p. 37a).

The court then concluded that "the withdrawal of McKenzie's disability benefits was improper, under the arbitrary and capricious standard of review...Travelers failed to consider substantial vocational evidence;..." Judgment was later entered against McKenzie based upon new evidence submitted by Travelers directly to the court on "remand."[8] (Appendix F p. 37a).

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8. The District Court having found Travelers' record inadequate, proceed to "remand" to permit a vocational analysis with the results to be presented to the court. Predictably, Travelers vocational consultant opined that there were literally hundreds of jobs suitable to McKenzie's impairment. McKenzie offerred counter evidence based upon actual testing that showed he was unable to work. The Court disregarded (cont'd)

Judgment against McKenzie was later entered based upon new vocational evidence presented to the district court. (Appendix E pp. 21a-26a).

The Ninth Circuit Court of Appeals reviewed the case de novo. (Appendix C, pp. 10a-11a). It held, in pertinent part, that the district court's remand procedure was error, consistent with the Ninth Circuit's 1993 ruling in *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469 (9th Cir. 1993). (Appendix C, pp. 14a-15a).[9] Notwithstanding that error, summary judgment for Travelers' was affirmed. (Appendix B, p.3a). The court expressly rejected *Jenkinson v. Chevron Corp.*, 634 F. Supp. 375 (N.D. Cal. 1986) and *Gunderson v. W.r. Grance & Co. Long Term Disability Income Plan*, 874 F.2d 496 (8th Cir. 1989), (which required the consideration of vocational evidence under a general disability standard of eligibility) and followed the case-by-case approach appearing in *Duhon v. Texaco, Inc.*, 15 F.3d 1302 (5th Cir. 1994) and its successor, *Block v. Pitney*

(Cont'd)

McKenzie's new evidence for it felt that the arbitrary and capricious standard required the court to rule on the sufficiency of the Travelers' evidence alone.

9. McKenzie agrees with the circuit court below, that the district court's "remand" procedure was error.

Bowes, Inc., 952 F.2d 1450 (D.C. Cir.free 1992). (Appendix C, pp. 16a-17a). Once free to apply an ad hoc standard, the court concluded that the record was adequate to sustain Travelers' withdrawal decision.[10] (Appendix C, pp. 18a-19a)

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted To Resolve Conflicts In Principle Among the Lower Courts (S Ct Rule 10.1(a))

This case was initiated on what was effectively a stipulated record, namely the Travelers' claim file for John P. McKenzie. The fact that highly contentious and costly litigation ensued is a direct result of the utterly confused state of ERISA disability case law.

Presently, the Eight Circuit Court of Appeals in *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496, 499 (8th Cir. 1989) directs that "before terminating benefits, the Plan administrator should have obtained a vocational expert's opinion to determine if [the claimant] is presently capable, in light of his physical impairment, to

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10. The court cited McKenzie age (51) and high level of education as factors, then apparently disregarded the admitted fact that McKenzie was unable to perform his desk job at GTEL.

perform 'any occupation.'" Accordingly, where an individual is unable to perform their normal job, vocational evidence is required. (excepting cases where the evidence shows that the beneficiary is in fact gainfully employed. *Potter vs. Connecticut General Life Ins. Co.* 901 F.2d 685 (8th Cir. 1990)) The *Gunderson* court effectively adopted the reasoning of *Jenkinson*, in the same fashion that Judge Smith of the District Court for Northern California did in this case.

The Fifth Circuit Court of Appeals in *Duhon v. Texaco, Inc.* 15 F.3d 1302 (5th Cir. 1994) and, prior to it the District of Columbia Circuit Court of Appeals in *Block vs. Pitney Bowes Inc.* 952 F.2d 1450 (D.C. Cir. 1992), have adopted a contrary view. In *Duhon*, at p. 1309, the court stated "we will not hold that absent vocational rehabilitation evidence a plan administrator necessarily abuses his discretion in making a final determination of disability. Instead, we will allow the reviewing court to decide, on a case-by-case basis, whether under particular facts the plan administrator abused his discretion by not obtaining the opinion of a vocational rehabilitation expert." Unlike Judge Smith, the Ninth Circuit's de novo review comports with reasoning of *Duhon* and *Block*.

Unless the Court acts to resolve the split in authority, the litigation senario presented by this case will be replicated countless times. In

jurisdictions where the issue is not settled, plan administrators and trustees will be placed in the untenable position of having to guess as to sufficiency of their analysis. District court judges will have to guess as to the sufficiency of the record when asked to review administrator withdrawal decisions. On the other hand, in the Eighth, Fifth, District Court Circuits, and now the Ninth Circuit, plan administrators and trustees (such as Travelers for various GTE entities engaged in business nationwide) must develope different claims administration procedures for beneficiaries, that differ only in where they reside.

ERSIA was enacted to promote employee benefits plans by the adoption of uniform rules. Its administrative review procedures, were devised, in part "..to promote the consistent treatment of claims for benefits..." *Amato v. Bernard,* 618 F. 2d 559, 567 (9th Cir. 1980); *Sandoval v. Aetna Life and Cas. Ins. Co.,* 967 F.2d 377, 382 (10 Cir. 1992)

Petitioner submits that consistent claims treatment necessarily requires uniform guidence as to evidentiary standards upon which claims decisions will be reviewed by the district courts. Unless the Court acts to resolve the conflict in authority, consistent treatment of disability claims under a general disablity policy is simply impossible.

Certiorari Should Be Granted to Resolve An Important Issue Of Federal Law. S. Ct Rule 10.2

This case was initated because Travelers never told McKenzie what kind of new occupation it believed he was capable of performing. The fact that Travelers believed McKenzie could do "sedentary" work, and communicated that fact in its withdrawal letter, is of little value to a participant that was forced to leave a desk job.

Petitioner submits that the Court should act here to establish a uniform rule regarding what is required of administrators under ERISA plans that utilize a general disability eligibility standard. He submits that the the LTD Plan's language requires that Travelers undertake at least some degree of vocational analysis.

The scope of the term "any occupation" is limited by the phrase "if you are completely unable to engage in any and every duty pertaining to" (emphasis added) and by the reference to the participant's education, skill and training. Those qualifying phrases clearly suggest that an administrator must undertake an analysis of a specific types of jobs. The failing of Travelers' analysis here is apparent when you ask, what are the any and every duties of "sedentary" work and how did those duties differ from McKenzie's GTEL position. Similarly, ask, what if any comparision was made by Travelers between McKenzie's

education, training, and skill and a new job; the answer is none. Petitioner submits that Judge Lynch in Jenkison, at 379, correctly observed that "[L]ogic dictates" that where plan that utilizes a general disablity standard some degree of vocational evidence is required.

Regretably, in adopting the case-by-case *Duhon* rule, the Ninth Circuit has endorsed an evidentiary standard that falls short of what logic and the express terms of the LTD Plan require.

Secondarily, the case-by-case rule will cause an ERISA disability free-for-all. With each new decision, it is certain that the rules regarding the sufficiency of an administrator's record will become more convoluted than they presently stand. Petitioner submits that in an attempt to free trustees and administrators, so they may exercise their discretion, the circuit court has aborgated its responsiblity to provide the guidence necessary to litigants and district court judges. A case-by-case rule increases the risk of future misunderstandings as to how the law will be applied contrary to the purposes of the ERSIA scheme. *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309. (citing *Makar v. Health Care Corp.*, 172 F.2d 80,83 (4th Cir. 1989).

Lastly, petitioner submits that the Court should reject the *Duhon* case-by-case approach as contrary to the purposes of the ERISA review scheme which are intended to promote resolution of

eligiblity decisions through administrative means rather than litigation. *Sandoval v. Aetna Life And Cas. Ins. Co.*, 967 F.2d 377, 380, (10th Cir. 1992) In its place, he suggests a uniform rule that requires plan administrator to identify out of the galaxy of any occupations, specific occupations it believes to be suitable.

There is no question that vocational evidence can involve a wide spectrum of activities. However, common to every vocational analysis is an evaluation of the individual's physical impairment and his actual job duties or proposed new job duties.

The comparison of duties to impairment is implicit in every eligiblity decision under the "normal" job standard. However under that standard the required job duties of the position are clearly identifiable and understood by the beneficiary, his doctors and the plan administrator. The participants to an eligibility decision do not need the expertise of a separate vocational expert inorder to identify the required duties of the job. In fact, typically there is a specific aspect of the work the parties can readily identify that an individual is incapable of performing. For example, in the case of a beer truck driver, the act of lifting kegs of beer. Accordingly, in the case of a "normal" job eligibility standard, eligibility disputes are typically resolved without litigation because of the common understanding of required

duties.

Once the eligibility analysis shifts to an "any occupation," standard, the common understanding of required duties is lost, unless the plan administrators identifies for the beneficiary alternative positions it believes are suited to the beneficiary. By that act, the administrator demonstrates to the beneficiary it understands the full nature of the disabilty (degree of impairment) and its impact on job required duties. It will permit the kind of concrete analysis on the part of all concerned that occurs under the "normal" job standard.

Petitioner submits that the two tier standard for eligibility was not intended to permit the kind of slip-shot analysis that Travelers undertook prior to its withdrawal decision here. He submits that a uniform rule that requires administrators to specifically identify alternative jobs will assured considered decisions by plan administrators and reduce the number of contested claims, thereby promoting ERSIA goals.

Where the plan administrator has previously determined that the beneficiary is unable to perform his "normal" occupation, petitioner submits a compelling case can be made for a uniform rule. Such a determination evidences the existence of a signficant physical impairment. It also begs the question, what alternatives occupations are

suitable for this individual? The Court should intervene to direct that the question should be answered before disability benefits are withdrawn.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner
John P. McKenzie

APPENDIX A — MANDATE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 9, 1995

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 556-3031

January 9, 1995

CASE NUMBER: C90-1699 FMS

CASE TITLE: John P. McKenzie, v. General Telephone Co. of CA, et al.,

DATE MANDATE FILED: 1/6/95

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Sincerely,
RICHARD W. WIEKING, Clerk
s/ Paul F. Garza
by: Paul F. Garza
Case Systems Administrator

Distribution: CIVIL — Counsel of Record
CRIMINAL — Counsel of Record

Appendix A

U.S. Marshal (Copy of Mandate)
U.S. Probation Office

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 5, 1994

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-15532
CT/AG# CV-90-01699-FMS

JOHN P. MCKENZIE

Plaintiff-Appellant

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, dba GTEL, et al.

Defendant-Appellee

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 5, 1994

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 5, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15532

D.C. No. CV-90-01699-FMS

OPINION

JOHN P. MCKENZIE,

Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, dba GTEL, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
July 15, 1994 — San Francisco, California

Filed December 5, 1994

Appendix C

Before: Ferdinand F. Fernandez, Pamela Ann Rymer, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

* * *

COUNSEL

Andrew H. Lange, Lange & Lange, San Francisco, California, for the plaintiff-appellant.

Michael W. Melendez, Sonnenschein, Nath & Rosenthal, San Francisco, California, for the defendants-appellees.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

John P. McKenzie (McKenzie) brought suit against The Travelers Insurance Company (Travelers), GTEL, GTE Corporation, and GTE Long Term Disability Plan (Plan) pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, to recover long-term disability benefits.[1] Specifically, McKenzie relies on 29 U.S.C. § 1132(a)(1)(B) which provides a cause of action for benefits due under the Plan. McKenzie challenges Travelers' reevaluation of

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1. McKenzie also brought suit against the GTE Medical Benefits Plan, the GTE Pension Plan, and the GTE Life Insurance Plan which automatically ceased as a result of Travelers' withdrawal of long-term disability benefits.

his disability pursuant to a more strict standard after eighteen months of disability. We affirm the district court's grant of summary judgment in favor of the appellees, but hold that the district court's consideration of vocational evidence, which was not in the administrative record, was improper and unnecessary.

FACTS AND PROCEDURAL HISTORY

In September 1987, McKenzie was hired by GTEL, an affiliate of GTE, to fill the position of Regional Service Manager. As a management level employee of GTEL, McKenzie qualified to participate in the Plan. The Plan is a contributory plan which provides for both short-term and long-term disability benefits and is underwritten by Travelers.

Eligibility for long-term disability benefits requires an employee to be "totally disabled" as defined by the Plan. During the first eighteen months of disability, an employee is totally disabled if he cannot perform his own or a similar occupation. After the first eighteen months of disability, the "any occupation" standard applies. Under this standard, an employee must be incapable of performing any occupation in order to be totally disabled.[2]

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2. The specific provisions of the Plan defining total disability are as follows:

> 1. During the first 18 months only of absence from work because of disability you will be assumed to be totally disabled if because of disability you are unable (as determined by The Travelers) to perform the normal duties or your regular occupation for any Employer or an alternate occupation with similar earnings potential and you are not engaged in any other occupation or employment for wage or profit; and,
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> (Cont'd)

According to McKenzie, he received an overview of the Plan during the GTEL interview process and an enrollment sheet during GTEL orientation after he was hired. McKenzie does not believe he was given a Summary Plan Description (SPD) as required by 29 U.S.C. §§ 1021 and 1024(b). Instead, he claims that he did not receive an SPD until he became disabled. Travelers did provide McKenzie with a copy of the Plan upon his request when he applied for long-term disability benefits. Also, when it initially approved his disability benefits, Travelers sent him a letter setting forth the applicable standards for total disability. Finally, when Travelers terminated his long-term disability benefits, it sent McKenzie a letter setting forth and relying on the "any occupation" standard. McKenzie concedes the terms of the Plan were not intentionally concealed.

Approximately sixteen months after he was hired, McKenzie began experiencing acute back pain and sought medical attention from Dr. Gerald Keane (Keane). In January 1989, Keane placed McKenzie on temporary disability, providing the necessary medical authorization for disability leave. During this period of temporary disability, McKenzie received short-term disability benefits under the Plan. He resumed work at GTEL in mid-April 1989. Again, on May 22, 1989, Keane placed McKenzie on temporary disability, and McKenzie received short-term disability benefits until May 25, 1989, when GTEL terminated his employment due in part to his

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> 2. [A]fter the first 18 months you will be considered totally disabled only if you are completely unable to engage in any and every duty pertaining to any occupation or employment for wage or profit for which you are or become reasonably qualified by training, education or experience.

absences from work. After his termination, McKenzie applied for long-term disability benefits. In October 1989, Travelers approved McKenzie's request with benefits beginning retroactively on August 26, 1989.

Travelers undertook further review of McKenzie's disability, as its eighteen-month anniversary approached, to determine whether McKenzie was totally disabled under the "any occupation" standard. In response to this review, Keane opined that McKenzie remained disabled. On two occasions, Travelers requested McKenzie submit to an independent medical examination, and McKenzie declined to be examined by the doctor selected by Travelers. However, he was examined by a doctor of his own choosing, Dr. E.A. Baciocco (Baciocco), a board-certified orthopedic surgeon. Baciocco noted "evidence of some lateral recess stenosis, along with foraminal stenosis at L4-5 and a small central disc herniation at C4-55 in the neck." However, despite this evidence, Baciocco opined that there were "very few objective signs and evidence of neurological disease." Further, Baciocco noted he was "somewhat nervous" by the inconsistency between McKenzie's physical condition and his inability to work for two years given that his previous occupation did not involve heavy physical exercise Baciocco further noted this inconsistency was difficult to explain.

In response to Baciocco's report, Travelers terminated McKenzie's benefits because objective medical documentation did not support a conclusion of total disability under the "any occupation" standard. After Travelers terminated benefits, McKenzie provided Travelers with the medical opinion of Dr. David L. Kneapler (Kneapler), a specialist in rheumatology. Kneapler noted stiffness of the back in the supine position, some degenerative disk disease, and the effects of McKenzie's prior laminectomy in his lumbosacral spine. However, Kneapler noted

that "[p]hysical examination revealed a healthy-appearing man with a normal general exam." Travelers found Kneapler's report to be "unremarkable" and reaffirmed its decision that McKenzie was not totally disabled.

McKenzie filed suit in state court seeking benefits under the Plan, and the case was removed to federal district court. The parties brought cross-motions for summary judgment, and the district court held that Travelers was not estopped from applying the "any occupation" standard. However, applying an arbitrary and capricious standard, it further held that Travelers' withdrawal of disability benefits pursuant to the "any occupation" standard was not supported by substantial evidence because Travelers had failed to consider vocational evidence. To remedy this error, the district court remanded the case to Travelers for a vocational assessment.

On remand, Cherie King (King), Travelers' in-house rehabilitation counselor, performed a vocational assessment and transferable skills analysis and concluded that McKenzie was qualified for ten different categories of jobs listed in the Dictionary of Occupational Titles, including several managerial positions. Travelers also hired Dr. Lawrence Deneen (Deneen) to perform a vocational assessment and labor market survey. Deneen concluded that, in light of McKenzie's educational background, he was qualified for 848 job openings listed in two area counties.

In response to Travelers' vocational evidence, McKenzie requested that discovery be reopened so he could depose Travelers' vocational experts. This request was denied. However, McKenzie did obtain the declaration of a vocational counselor, Yanela Burke (Burke), which challenged Deneen and King's reports.

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All of the vocational evidence obtained on remand, including the reports of Deneen, King and Burke, were submitted directly to the district court. Based on this evidence, the district court granted summary judgment for Travelers, holding that Travelers' vocational assessment was supported by substantial evidence.

McKenzie appeals the district court's judgment for Travelers challenging the application of the "any occupation" standard; the remand for new evidence and review of that evidence; and the district court's grant of summary judgment for Travelers.

DISCUSSION

A. Standard of Review

"[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). When a plan fiduciary has discretionary authority, the proper standard of review for ERISA claims brought under § 1132(a)(1)(B) is arbitrary and capricious. *See Madden v. ITT Long Term Disability Plan,* 914 F.2d 1279, 1283-84 (9th Cir. 1990), *cert. denied,* 498 U.S. 1087 (1991). McKenzie concedes that the Plan gives Travelers discretionary authority to determine his eligibility for benefits. Thus, Travelers' decision to terminate McKenzie's benefits is reviewed pursuant to an arbitrary and capricious standard or for abuse of discretion.[3] We review the

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3. Our recent decision in *Taft v. Equitable Life Assurance Soc'y,* 9 F.3d 1469 (9th Cir. 1993), uses the term "abuse of discretion" in place of "arbitrary and

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district court's application of this standard and its grant of summary judgment *de novo*. *See id.* at 1283.

B. Application of the "Any Occupation" Standard

McKenzie argues that Travelers should be estopped from reevaluating his disability and denying benefits under the "any occupation" standard because it failed to provide him with an SPD. Addressing this claim, the district court held that McKenzie had failed to demonstrate Travelers' procedural violation caused him substantive harm. We agree and hold that the "any occupation" standard is applicable.

McKenzie argues that we should find substantive harm "automatically follows when the procedural violation results in a failure to disclose[] provisions that go[] to the very essence of coverage." Apparently, McKenzie is requesting that we presume substantive harm when benefits are denied pursuant to provisions of the Plan which were not properly disclosed. Alternatively, he argues there is a triable issue of fact that he suffered substantive harm as a result of the procedural violation.

The district court relied on our decision in *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), to hold that McKenzie had failed to demonstrate substantive harm as a consequence of Travelers' failure to provide him with an SPD. In *Blau*, the plaintiff sought benefits under an ERISA plan's severance pay policy. The undisputed

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capricious," but we indicated that we intended to make no distinction between the two terms. *Id.* at 1471 n.2; *see also Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 949 (9th Cir. 1993). Likewise, in this case, we use the terms interchangeably.

facts showed that the provision of the plan at issue had been intentionally concealed from beneficiaries and that the defendants failed to comply with virtually every applicable mandate of ERISA. *Id.* at 1353. "[T]here was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything." *Id.* Furthermore, the defendants were attempting to impose a standard not contained in the terms of the plan. *Id.* at 1354. We held that "[o]rdinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy."[4] *Id.* at 1353. However, we created an exception to this general rule, holding that if continuing procedural violations result in "substantive harm," then "a court must consider [such violations] in determining whether the decision to deny benefits in a particular case was arbitrary and capricious." *Id.* at 1354. We did not define substantive harm in *Blau*, but instead, we presumed it from the defendants' egregious procedural violations.[5] *See id.* ("When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee. . . .").

We decline to presume that Travelers' procedural violation, caused by its failure to give McKenzie an SPD, resulted in

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4. A "substantive remedy" is the retroactive reinstatement of benefits. *Grossmuller v. International Union, U.A.W.*, 511 F. Supp. 709, 711 (E.D. Pa. 1981).

5. Courts have limited *Blau's* finding of substantive harm to its facts. As one court noted, "[c]ourts have either distinguished the facts of *Blau* or criticized its holding to find that employers' procedural violations of ERISA did not result in substantial harm." *United Paperworkers v. International Paper Co.*, 777 F. Supp. 1010, 1020 n. 22 (D. Me. 1991) (collecting cases). Consequently, *Blau* is the only example of a case in which substantive harm resulting from procedural violations has been presumed.

substantive harm. McKenzie's case can easily be distinguished from *Blau.* McKenzie concedes that, unlike the defendants in *Blau,* Travelers did not intentionally conceal the terms of the Plan. Nor has McKenzie claimed Travelers was unfairly administering the Plan by applying standards which are not embraced within its terms; the "any occupation" standard is clearly set forth in the Plan. *See Clark v. Washington Teamsters Welfare Trust,* 8 F.3d 1429, 1432 (9th Cir. 1993) (distinguishing *Blau* as based on "flagrant disregard of the clear terms of the plan"); *Berger v. Edgewater Steel Co.,* 911 F.2d 911, 920-921 (3rd Cir. 1990) (distinguishing *Blau* on grounds that plan was not administered unfairly or actively concealed), *cert denied,* 499 U.S. 920 (1991). Furthermore, Travelers informed McKenzie of the applicable standards under the Plan on several occasions. Travelers gave him a copy of the Plan pursuant to his request when he was applying for long-term benefits; sent him a letter awarding long-term benefits and setting forth the standards for total disability, including the "any occupation" standard; and finally, sent him a termination letter which relied on the "any occupation" standard. Thus, McKenzie had adequate notice of the applicable standard, and Travelers' failure to provide him with an SPD did not prejudice his opportunity to obtain a full and fair review of his claim. Consequently, we neither presume substantive harm nor find a triable issue of fact regarding substantive harm which might preclude the application of the "any occupation" standard, and we review McKenzie's claim to determine whether he is entitled to benefits under this standard.

C. Vocational Evidence

The district court held Travelers' decision to terminate McKenzie's benefits was not supported by substantial evidence because Travelers failed to consider vocational evidence in

determining total disability under the "any occupation" standard, and it remanded to Travelers for a vocational assessment of McKenzie's abilities. On remand, Travelers apparently made no redetermination of McKenzie's claim, but instead merely collected vocational evidence and submitted it directly to the district court. McKenzie, likewise, submitted vocational evidence to the district court, although he was denied the opportunity to depose Travelers' vocational experts.

McKenzie challenges the district court's consideration of vocational evidence after remand. The thrust of McKenzie's argument is that, because the vocational evidence was submitted directly to the district court, Travelers did not exercise any discretion, and the district court reviewed new evidence not in the administrative record. We agree that the district court improperly considered the vocational evidence which was not in the administrative record.

In *Taft v. Equitable Life Assurance Soc'y,* 9 F.3d 1469 (9th Cir. 1993), the district court relied on testimony which was not part of the administrative record. *Id.* at 1471. We held that the abuse of discretion standard "permits the district court to 'review only the evidence presented to the plan trustees.' " *Id.* (brackets omitted) (quoting *Jones v. Laborers Health & Welfare Trust Fund,* 906 F.2d 480, 482 (9th Cir. 1990)). We reasoned that "[p]ermitting a district court to examine evidence outside the administrative record would open the door to the anomalous conclusion that a plan administrator abused its discretion by failing to consider evidence not before it." *Id.* at 1472. We also noted that such an expansive review by the district court would impede one of ERISA's primary goals of providing "a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously." *Id.* (quotation omitted).

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As in *Taft,* we hold that the district court may not consider "new evidence," *i.e.,* evidence which was not part of the administrative record. Under the abuse of discretion standard, the district court may review only evidence which was presented to the plan trustees or administrator. In this case, the vocational evidence was never presented to Travelers for a determination of McKenzie's eligibility for benefits under the "any occupation" standard. Instead, this evidence was submitted by both Travelers and McKenzie directly to the district court. Because this evidence was not in the administrative record, we hold that the district court erred in relying on it to grant summary judgment for Travelers.

However, despite the district court's error in considering vocational evidence outside the administrative record, we affirm its grant of summary judgment for Travelers on other grounds. *See Shamut Bank, N.A. v. Kress Assoc.,* 33 F.3d 1477, 1484 (9th Cir. 1994) (court of appeals may affirm summary judgment on "any ground supported by the record"). We conclude that in this case the district court did not need to remand for consideration of vocational evidence because Travelers' decision that McKenzie was not disabled under the "any occupation" standard was supported by substantial evidence even absent vocational evidence.

The district court relied on *Jenkinson v. Chevron Corp.,* 634 F. Supp. 375 (N.D. Cal. 1986), to remand to the administrator for consideration of vocational evidence prior to granting summary judgment for Travelers. The court in *Jenkinson* held that:

> Logic dictates that a determination of whether the "any occupation" definition of disability has been met by a claimant requires

> consideration of two types of evidence. First, there must be evidence as to the medical condition or degree of impairment of the claimant. Additionally, there must be evidence as to the existence of jobs for those of the claimant's qualifications, or potential qualifications, in light of his or her impairment.

Id. at 379 (footnote omitted). The court concluded that the second type of evidence, *i.e.*, vocational evidence, must be given by "someone knowledgeable about the physical demands and requirements of occupations for which a claimant might be qualified." *Id.*

Some courts have relied on *Jenkinson* and held that when the "any occupation" standard is applicable, vocational evidence should be considered. *See Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan,* 874 F.2d 496, 499 (8th Cir. 1989) (holding that "before terminating benefits, the Plan should have obtained a vocational expert's opinion to determine if [the claimant] is presently capable, in light of his physical impairment, to perform 'any occupation' "); *but see Potter v. Connecticut Gen. Life Ins. Co.,* 901 F.2d 685, 686 (8th Cir. 1990) (holding consideration of vocational evidence unnecessary where other evidence conclusively establishes the claimant had no disability); *Jenkinson,* 634 F. Supp. at 379 n. 3 (noting that there is "no need for vocational evidence where there is indication of . . . no impairment"). Conversely, other courts have rejected the notion that a plan administrator is required to obtain vocational evidence before making a final determination of eligibility under the "any occupation" standard. *See Duhon v. Texaco, Inc.,* 15 F.3d 1302, 1309 (5th Cir. 1994); *Block v. Pitney Bowes, Inc.,* 952 F.2d 1450, 1455 (D.C. Cir. 1992).

Appendix C

In *Duhon,* the Fifth Circuit held that a plan administrator did not necessarily abuse its discretion by failing to consider vocational evidence in making a final determination of disability. *Id.* at 1309. Instead, the court held that "the reviewing court [may] decide on a case-by-case basis, whether under the particular facts the plan administrator abused his discretion by not obtaining the opinion of a vocational rehabilitation expert." *Id.* In the particular case of *Duhon,* the failure to meet the "any occupation" standard "only required a finding that Duhon could perform any job for which he is, or may become, qualified by education, training, or experience." *Id.* (quotation omitted). The evidence demonstrated that "Duhon was a sixty-five year old man in overall good health with a high school diploma and moderate restrictions on his physical ability." *Id.* In light of this evidence, the court held that "[i]t was not an abuse of discretion for the plan administrator to conclude that Duhon was capable of performing some type of occupation without obtaining the opinion of a vocational rehabilitation expert." *Id.* (footnote omitted). *See also Block,* 952 F.2d at 1455 (holding that claimant's limitations on standing (two hours), walking, lifting (20 pounds), and bending (four out of eight hours) were not so great as to conclude that claimant would not be qualified for any job).

In accord with the Fifth Circuit and the District of Columbia Circuit, we hold that consideration of vocational evidence is unnecessary where the evidence in the administrative record supports the conclusion that the claimant does not have an impairment which would prevent him from performing some identifiable job. The plan administrator is not required in every case where the "any occupation" standard is applicable to collect vocational evidence in order to prove there are available occupations for the claimant.

In this case, as in *Duhon*, the language of the "any occupation" standards is not demanding. In order for Travelers to find that McKenzie is not totally disabled, it requires only that McKenzie be able to perform a job for which he is qualified or for which he can reasonably become qualified by training, education or experience. Substantial evidence in the administrative record supports the conclusion that McKenzie could perform other occupations. The record indicates that McKenzie is fifty-two years old, and he has a bachelor's degree and a master's degree. Thus, McKenzie is not unemployable because of his age, *see Duhon*, 15 F.3d at 1308 ("people in their sixties and seventies . . . are employed and employable through the workplace today"), and he is highly educated. Further, the medical evidence does not support the conclusion that McKenzie is unemployable. At most, this evidence suggests that McKenzie might have a slight impairment. Baciocco opines that there is an inconsistency between McKenzie's physical condition and his inability to work for two years given that his previous occupation did not involve heavy physical exercise. Thus, his opinion supports the conclusion that McKenzie not only could work at other occupations which did not involve heavy exercise, but he may even be able to work at his old occupation. Likewise, Kneapler states that McKenzie appears healthy and normal. Based on the evidence in the administrative record, we hold that Travelers did not abuse its discretion or act arbitrarily and capriciously when it concluded that McKenzie's disability did not prevent him from pursuing any occupation.

CONCLUSION

We hold that Travelers was not estopped to apply the "any occupation" standard and its procedural violation caused by failing to provide McKenzie with an SPD did not cause

McKenzie substantive harm. Further, we hold that the district court erred by considering vocational evidence which was not in an administrative record. However, despite this error, we affirm the district court's summary judgment for the appellees and hold that substantial evidence supports Travelers' denial of benefits under the "any occupation" standard.

AFFIRMED.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 3, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 90-1699 FMS

JOHN P. MACKENZIE

Plaintiff (s),

vs.

GTEL, et al.,

Defendant (s).

JUDGMENT

For the reasons set forth in the accompanying Order Granting Defendants' Motion for Summary Judgment, judgment is hereby entered in favor of Defendants.

The Clerk of the Court is directed to close the file.

SO ORDERED.

DATED: March 3, 1993

s/ Fern M. Smith
FERN M. SMITH
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 3, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 90-1699 FMS

JOHN P. MACKENZIE

Plaintiff (s),

vs.

GTEL, et al.,

Defendant (s).

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

By order dated November 10, 1992, the Court deferred ruling on the cross-motions for summary judgment and remanded this matter to Defendants in order to perform further vocational analysis. Defendants performed this analysis and filed a supplemental brief with supporting declarations. Plaintiff has filed an opposition brief to the Defendants' submissions. For the reasons set forth below, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

Appendix E

ANALYSIS

As a preliminary matter, Plaintiff challenges the Court's November 10, 1992 ruling remanding the matter for further evidentiary submissions. Plaintiff contends that since the Court found that Defendants' denial of benefits was made without substantial facts and was therefore arbitrary and capricious, it was improper for the Court to order further evidentiary submissions. *See Wardel v. Central States, Etc.*, 627 F.2d 820 (7th Cir. 1980); *Perry v. Simplicity Engineering*, 900 F.2d 963 (6th Cir. 1990); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377 (10th Cir. 1992).

All of these cases involved new evidence proffered by the *plaintiff* to show that he qualified for benefits. Obviously, such evidence offered after the plan administrator has already rendered a decision cannot be used to show that the administrator acted arbitrarily and capriciously.

The situation in this case is completely different, however. In the November 10, 1992 order, the Court held that both medical and vocational evidence is necessary to determine whether Plaintiff is entitled to benefits under the "any occupation" standard. In reviewing Defendants' denial of benefits, the Court found that the physical evidence before Defendants at the time of the decision satisfied the medical prong of this analysis. The Court's holding that Defendants acted arbitrarily and capriciously was based on the finding that Defendants failed to perform a sufficient vocational analysis.

Having identified this *sole* deficiency in Defendants' review process, an order requiring Defendants to undertake a completely new review, as requested by Plaintiff, makes little sense. By

ordering Defendants to perform a vocational analysis *based on the medical evidence that had already been produced,* the Court remedied the deficiencies in Defendants original review process while minimizing the expenses incurred by both parties.[1] Particularly since a plan administrator's failure to follow proper procedures does not create any substantive right of action for a plan beneficiary, *see Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), the Court's solution, which filled the holes in the original review, was the proper remedy for Defendants' violations of their fiduciary duty.

Turning to the merits of the further submissions filed by both parties, the Court finds that the recent vocational analysis performed by Defendants shows that the denial of benefits was proper. Cherie King, Defendants' in-house rehabilitation counselor, performed a vocational assessment and transferable skills analysis and concluded that Plaintiff qualified for ten different categories of jobs listed in the Dictionary of Occupational Titles, including several types of managerial positions. This conclusion accounted for Plaintiff's past work experience, educational level, and physical restrictions as set forth in the medical evidence previously presented to Defendants.

Defendants also hired an outside rehabilitation counselor, Dr. Lawrence Deneen ("Dennen"), to perform a vocational assessment and labor market survey. This assessment was based on the same medical evidence in front of Defendants' counselors.

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1. Given the highly deferential standard of review applied to a plan administrator's denial of benefits, Plaintiff's desire to engage in extensive additional discovery is only likely to increase Plaintiff's expenses without producing a different result.

Appendix E

Starting with the premise that the medical evidence indicated that Plaintiff could pursue occupations characterized by sedentary or light physical demands, Deneen concluded that, in light of Plaintiff's educational background, he could qualify for positions as a personnel training manager, communications/utility manager, personnel training labor relations specialist, management analyst, vocational counselor and for positions relating to management support. Based on labor market surveys conducted by the Employment Development Department ("EDD"), Deneen found that Plaintiff qualified for 848 job openings that were listed in San Francisco and Contra Costa Counties in 1991-92.

Plaintiff has submitted the declaration of an outside vocational counselor, Yanela Burke ("Burke"), to respond to the analysis performed by King and Deneen. Burke referred Plaintiff to the Comprehensive Health and Active Rehabilitation Training ("CHART") center in Concord, California for further evaluation. While Burke contends that the Dictionary of Occupational Titles analysis performed by King and Deneen was inappropriate, none of her criticism rises to the level necessary to reverse the denial of benefits. As long as the fiduciary's analysis is supported by substantial evidence, this Court has no power to reach a different result. *See Jenkinson v. Chevron Corp.*, 634 F. Supp. 375, 380 n.6 (N.D. Cal. 1986) (Court's duty as reviewing court is "to insure that decisions by a fiduciary are supported by substantial evidence"). Moreover, the analysis performed by CHART actually confirms the Defendants' conclusion that Plaintiff could pursue a variety of occupations. After three days of extensive testing which involved a variety of simulated work tasks, CHART concluded that Plaintiff's present physical capabilities allowed him to lift 10-15 lbs which is "adequate for most supervisorial/managerial type positions." Declaration of Yanela Burke, Exh. A at 11. While CHART did rate Plaintiff's Power,

Endurance, and Body Mechanics as inadequate for work, this conclusion was softened by the recommendation that Plaintiff seek active rehabilitation three times per week for two-three months and that, "Mr. MacKenzie demonstrates a good potential for return to work in a management-level position on a part-time basis, initially. Potential for full-time work is dependent upon his response to an active rehabilitation program." *Id.* In addition, Plaintiff's inability to perform various work-related tasks for more than a few minutes may stem less from the physical pain imposed by the tasks themselves than from the Plaintiff's boredom and preoccupation with his pain. As CHART noted, Plaintiff's limited ability to perform light work-related tasks is inconsistent with his ability to work for extended hours on his boat. *Id.* at 12 ("Conversely, he reports spending anywhere from 15 minutes to 2 hours per day working on his boat, which is inconsistent with his tolerance for less demanding activities included in the Functional Capacity Evaluation. This is not to infer the question of validity, but rather indicates the potential for exploration of interests and uses of diversion as an effective source for pain management."). CHART's analysis does not present an unequivocal rejection of Defendants' vocational assessment.

In light of the evidence presented by Defendant, and the failure of Plaintiff to show that Defendants' vocational assessment is not supported by substantial evidence, the Court GRANTS the Defendants' Motion for Summary Judgment and DENIES the Plaintiff's Motion for Summary Judgment.

The Clerk of the Court is directed to close the file.

SO ORDERED.
DATED: March 3, 1993

Appendix E

s/ Fern M. Smith
FERN M. SMITH
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA REMANDING FOR FURTHER EVIDENTIARY SUBMISSIONS FILED NOVEMBER 10, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-90-1699 FMS

JOHN P. MCKENZIE

Plaintiff,

vs.

GTEL, a California corporation, GTE CORPORATION, GTE LONG TERM DISABILITY PLAN, GTE MEDICAL EVIDENTIARY BENEFITS PLAN, GTE PENSION PLAN, GTE LIFE INSURANCE PLAN, and THE TRAVELERS INSURANCE COMPANY,

Defendants.

ORDER REMANDING THIS MATTER FOR FURTHER EVIDENTIARY SUBMISSIONS

In this action, Plaintiff John P. McKenzie ("McKenzie"), a former GTEL Regional Service Manager, challenges the withdrawal of his benefits which he had been receiving under the GTE Long Term Disability Plan ("LTD Plan" or the "Plan"),[1]

1. McKenzie's claims against GTE Corporation, GTE Medical Benefits Plan, GTE Pension Plan and GTE Life Insurance Plan rise or fall with his claims against Travelers under the LTD Plan.

pursuant to 29 U.S.C. § 1132(a)(1)(B).[2] Defendant The Travelers Indemnity Company of Rhode Island ("Travelers") was the underwriter and administrator of the LTD Plan. On October 9, 1992, both McKenzie and Travelers filed motions for summary judgment with this Court.

Travelers moves for summary judgment on the grounds that under the "arbitrary and capricious" standard of review, McKenzie is not entitled to receive benefits from the LTD Plan after the date Travelers withdrew coverage. Travelers also requests that attorney's fees and costs be awarded in their favor.

McKenzie moves for summary adjudication of issues against the defendants on the grounds that (1) Travelers is estopped from applying a stricter standard in determining McKenzie's qualification for benefits, and (2) even under the strict standard, Travelers failed to properly consider sufficient medical and vocational evidence in determining to withdraw McKenzie's benefits.

BACKGROUND

McKenzie, who has suffered from a history of back pain, was employed by GTEL beginning on September 28, 1987. On January 16, 1989, he took leave from work due to serious back discomfort, returning to work on April 17, 1989. On May 23, 1989, McKenzie again went on disability leave. McKenzie has not undertaken any form of gainful employment since May 23, 1989. Effective May 24, 1989, McKenzie's employment with GTEL was terminated. On October 2, 1989, McKenzie's claim

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2. This statute falls under the Employee Retirement Income Security Act ("ERISA").

under the LTD plan was approved, effective August 26, 1989. Effective November 23, 1990, Defendant Travelers withdrew LTD benefits. On January 5, 1991 McKenzie appealed the withdrawal, requesting that his benefits be reinstated. On June 19, 1991, Travelers denied McKenzie's request for reinstatement.

McKenzie's primary treating physician was Dr. Gerald Keane. On October 18, 1990, Dr. Eugene Baciocco, a board-certified orthopedic surgeon, examined McKenzie. On January 16, February 19, and March 21, 1991, Dr. David L. Kneapler, a specialist in rheumatology, examined McKenzie.

On two occasions, McKenzie refused Travelers' request to undergo an independent medical examination ("IME"). On July 8, 1990, McKenzie informed Travelers that he would not undergo an IME, and cancelled the appointment. On October 4, 1990, McKenzie again cancelled his appointment with an IME, informing Travelers that he had scheduled an appointment with a doctor of his own choosing, Dr. Baciocco.

DISCUSSION

Summary judgment is granted when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Further, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The nonmoving party "may not rest upon the mere allegations . . . of the [nonmoving party's]

pleading, but the [nonmoving party's] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56. In determining whether to grant summary judgment, all justifiable inferences must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Standard of Review.

"[A] denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Language in a plan granting authority to the administrator to determine questions of eligibility and coverage is sufficient to demonstrate discretionary authority. *Bogue v. AMPEX Corp., 750* F.Supp. 424, 428 (N.D.Cal. 1990). Where such authority is given, a 'deferential standard of review' is appropriate, and the "arbitrary and capricious" standard of review will apply for ERISA claims brought under § 1132(a)(1)(B). *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1283-84 (9th Cir. 1990); *James v. Equicor, Inc.*, 791 F.Supp. 804, 806 (N.D.Cal. 1992). Under the "arbitrary and capricious" standard, decisions by the administrator of a benefits plan will not be reversed unless they are (1) arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law. *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1093 (9th Cir. 1985); *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984).

Here, McKenzie challenges his denial of disability benefits under § 1132(a)(1)(B). The terms of the Plan grants Travelers the

authority to determine whether the beneficiary is disabled and therefore eligible for benefits. Accordingly, this Court will review Travelers' decision to withdraw benefits under the arbitrary and capricious standard as set forth above.

B. Withdrawal of Plaintiff's Benefits.

1. Estoppel of Application of the "Any Occupation" Standard.

In determining whether a LTD Plan participant is disabled under the terms of the policy, the Plan's definition of "Total Disability" states:

> 1. During the first 18 months only of absence from work because of disability you will be assumed to be totally disabled if because of disability you are unable (as determined by The Travelers) to perform the normal duties of your regular occupation for any Employer or an alternate occupation with similar earnings potential and you are not engaged in any other occupation or employment for wage or profit; and
>
> 2. after the first 18 months you will be considered totally disabled only if you are completely unable to engage in any and every duty pertaining to any occupation or employment for wage or profit for which you are or become reasonably qualified by training, education or experience.

McKenzie alleges that Travelers is estopped from applying the stricter "any occupation" standard in determining McKenzie's qualification for benefits because Plaintiff was not provided a Summary Plan Description ("SPD").

According to ERISA, an employee benefit plan administrator is required to provide a SPD to each participant and beneficiary. 29 U.S.C. § 1021 & 1024(b). Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984). Plaintiffs must show a substantial lack of compliance with ERISA's reporting and disclosure requirements, with resulting substantial harm to the employee, before a nondisclosure violation of § 1021 is subject to redress as arbitrary and capricious behavior. *Rinard v. Eastern Co.*, 769 F. Supp. 1416, 1429 (S.D.Ohio 1991), *rev'd on other grounds, Rinard v. Eastern Co.*, No. 91-3853, 1992 U.S. App. LEXIS 27835 (6th Cir. Oct. 28, 1992); *see Blau v. Del Monte Corp.*, 748 F.2d at 1354. In *Blau*, the Ninth Circuit found that, in some cases, a multitude of procedural violations may give rise to a substantive harm in violation of the arbitrary and capricious standard. *Blau v. Del Monte Corp.*, 748 F.2d at 1354. There, the defendants, in utilizing a secret policy, had "failed to comply with virtually every applicable mandate of ERISA" in not providing a SPD, not having any claims procedures, not having a provision to inform claimants in writing of anything, and imposing standards that were not required by the policy. *Id.* at 1353-54.

Here, McKenzie contends that he was not provided a SPD until after his disability. Upon request, McKenzie was given a copy of the LTD Plan. When McKenzie qualified for disability benefits, Travelers sent him a letter which set forth the applicable provision of the Plan regarding the determination of "disability."

Nor has McKenzie has shown that Travelers purposefully and willfully acted to conceal the terms of the Plan from him. McKenzie has not demonstrated that Travelers' alleged failure to comply with the procedural requirements of ERISA rose to the level of a substantive harm. Accordingly, Travelers is not estopped from applying the "any occupation" standard in reviewing whether McKenzie was disabled.

2. Sufficiency of the Evidence.

McKenzie contends that Travelers failed to use sufficient medical and vocational evidence in support of its withdrawal of McKenzie's benefits, in violation of the arbitrary and capricious standard.

In *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1285 (9th Cir. 1990), a case factually similar to the present one, the Ninth Circuit concluded that the plan administrator's decision to terminate the plaintiff's benefits under the "any occupation" standard was not arbitrary and capricious. In making that conclusion, the court noted that the defendant's decision was based upon (1) "the most recent medical information in [the defendant's] files, provided by [the plaintiff's] own physician, [] which specifically noted that [the plaintiff] was not totally disabled from work" and (2) the plaintiff's employer's report of his educational background and work experience. *Id.* at 1285. Even though the defendant had performed a vocation assessment following the plaintiff's request for a *third* review of the defendant's decision, the Ninth Circuit did not take the vocational evidence into account in affirming the defendant's original decision to withdraw disability benefits.[3] *Id.* at 1285.

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3. The defendant's original decision to withdraw benefits did not consider any vocational evidence.

Appendix F

Vocational evidence has been considered in two district court cases, however. In *Jenkinson v. Chevron Corp.*, 634 F. Supp. 375, 379 (N.D.Cal. 1986), the court found improper termination of an employee's long-term benefits on the basis that the "any occupation" definition of disability requires consideration of two types of evidence: (l) the medical condition or degree of impairment of the claimant, and (2) evidence as to the existence of jobs for which the claimants is potentially qualified, given his impairment. The court also found that where the only evidence concerning the plaintiff's employability was conclusory statements which failed to specify particular jobs which the plaintiff was capable of performing, the plan fiduciary's decision to terminate benefits was "not supported by substantial evidence." *Id.* at 378-79. The court remanded the case, even though the record contained an "abundance of medical evidence." *Id.* at 380. Similarly, in *James v. Equicor, Inc.*, 791 F. Supp. 804 (N.D.Cal. 1992), the court, using a *de novo* standard of review, made its determination that the plaintiff was not disabled under the "any occupation" standard based upon both (1) medical evaluations submitted by three doctors, and (2) a MNA Transferable Skills Evaluation from an outside consultant. *Id.* at 808-09.

This Court finds the reasoning in *Jenkinson* persuasive in that consideration of both medical and vocational evidence is necessary to properly determine whether a claimant is totally disabled under the "any occupation" standard. The holding in *Madden v. ITT Long Term Disability Plan* is not applicable to the present case. In *Madden,* the medical evidence contained a specific finding that the plaintiff was not totally disabled, unlike this case. *Madden* at 1285. Moreover, the plaintiff in *Madden* was challenging the withdrawal of his benefits based on the defendant's failure to consider the plaintiff's social security

award, not the failure to perform adequate vocational analysis, as McKenzie does here. *Id.*

In the present case, Travelers determined that McKenzie was capable of performing sedentary work and therefore not "totally disabled" under the terms of the Plan. Travelers based this determination on (l) medical evidence from McKenzie's three doctors, and (2) McKenzie's managerial experience and educational background. Travelers argues that Dr. Keane's September 11, 1990 statement that McKenzie "would certainly be restricted from any job that requires repetitive bending or lifting, or anything with prolonged postural demands," suggests that McKenzie is not precluded from working at *any* occupation. Furthermore, Travelers offers the October 18, 1990 report of Dr. Baciocco, McKenzie's second doctor, which stated,

> The thing that makes me somewhat nervous, [] is the patient's inability to work since his work activity involved no heavy duty. There appeared to be no excessive physical exercise associated with his previous occupation, yet he has been off work for the past two years. In my opinion, this is difficult to explain and is somewhat inconsistent.

Finally, Travelers contends that despite Dr. Kneadler's conclusion in his March 26, 1991 report that McKenzie's injuries "prevent his returning to any gainful employ," the report also found objective medical evidence that McKenzie was a "healthy appearing man with a normal general exam" with good motion of the cervical spine, mild pain in lateral bending and mildly reduced motion of his thoracolumbar spine.

This physical evidence satisfies the medical prong of the test. Neither Dr. Keane nor Dr. Baciocco said that McKenzie could not work at any job. Further, Dr. Kneadler's statement that McKenzie was unable to work is not credible on its face.[4]

With respect to the vocational prong, Travelers contends that it performed a vocational assessment when it considered McKenzie's managerial experience and more than sixteen years of education in its decision to withdraw his disability benefits. Travelers consideration of McKenzie's managerial experience was limited to McKenzie's written answer to a question appearing on his Statement of Claim Form, in which McKenzie describes the mental and physical requirements of his position and how his disability prevents him from performing his duties. Similarly, Travelers consideration of McKenzie's educational background was limited to McKenzie's checking off a box on his claims statement which indicates that he has over 16 years of educational experience, including primary school through college.

In the absence of further evidentiary support, Travelers vocational analysis is inadequate. Travelers never performed any analysis specifying what jobs McKenzie could perform, aside from generally concluding he could perform "sedentary work." In addition, Travelers does not dispute McKenzie's contention that it failed to perform any independent vocational analysis prior to withdrawing McKenzie's benefits. Travelers admits that it did not (1) perform a Dictionary of Occupational Titles analysis to

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4. Dr. Kneapler's conclusion that McKenzie cannot return to "any gainful employ" inherently contradicts his own report that McKenzie was a "healthy appearing man with a normal general exam," and with only mild pain and mildly restricted motion.

ascertain whether or not McKenzie's skills were transferable to another occupation (2) make a labor market survey, nor (3) make an analysis of management positions in telecommunications that did not involve travel. In view of the lack of vocational evidence considered by Travelers, its decision to withdraw McKenzie's disability benefits was not supported by substantial evidence, even under the arbitrary and capricious standard.

CONCLUSION

Travelers' withdrawal of McKenzie's disability benefits was improper, under the arbitrary and capricious standard of review. In determining whether McKenzie was "totally disabled" under the terms of the LTD Plan, Travelers failed to consider substantial vocational evidence; however, Travelers may be able to sustain its burden after performing a vocational analysis. This case is remanded to Travelers for the performance of a vocational assessment of McKenzie's abilities by December 9, 1992. Travelers has until December 23, 1992 to file further Points and Authorities on the issue of the vocational evidence, not to exceed ten (10) pages. McKenzie has until January 4, 1993 to file his Points and Authorities, also not to exceed ten (10) pages. The matter will be deemed submitted as of that date, and will be decided on the papers.

SO ORDERED.

DATED: November 10, 1992

s/ Fern M. Smith
FERN M. SMITH
United States District Judge